# Petition

81-1657

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No. ..-....

IN THE

# Supreme Court of the United States

October Term, 1981

TOMY CORPORATION, a Wholly-Owned Subsidiary of TOMY KOGYO, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## Questions Presented.

Whether the National Labor Relations Board ("N.L.R.B.") abused its discretion by including all seasonal employees, who frequently work only a short period of time and the majority of whom do not return to work in subsequent seasons, in a unit with employees who work year-round?

Whether the N.L.R.B. applied the proper legal standard in determining whether a representation election should be set aside because one of the parties distributed or displayed an altered Board document, a copy of which the objecting party was unable to introduce into evidence at the hearing on the objections to conduct affecting the results of the election?

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TOMY CORPORATION, a Wholly-Owned Subsidiary of TOMY KOGYO, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc. ("Tomy"), petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 9, 1981.

### Opinions Below.

The memorandum decision of the Court of Appeals is unreported and is reproduced herein as Appendix A. The decision and order of the N.L.R.B. in case number 21-CA-19504, from which review was sought in the Court of Appeals, is reported at 255 N.L.R.B. No. 1 and is reproduced herein as Appendix B. The decision and direction of election and second supplemental decision and certification of rep-

resentative of the regional director of Region 21 of the N.L.R.B. in case number 21-RC-15635 are unreported and are reproduced herein as Appendix C and Appendix D.

**Jurisdiction.**

The memorandum decision of the Court of Appeals was filed and entered on December 9, 1981. Tomy filed a petition for rehearing on December 22, 1981, which the Court of Appeals denied by an order entered on January 29, 1982. The order is reproduced herein as Appendix E. Tomy filed a motion for stay of mandate on February 4, 1982, which the Court of Appeals granted by an order entered on February 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**Statutes Involved.**

Portions of sections 9(a) and 9(b) of the National Labor Relations Act ("N.L.R.A."), 29 U.S.C. §§ 159(a), (b), are applicable and are reproduced in Appendix F.

**Statement of the Case.**

At issue in this case is the validity of the certification of the General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America ("Union") as the exclusive representative of certain Tomy employees for purposes of collective bargaining.

On August 8, 1978, the Union filed a petition, case number 21-RC-15635, for a representation election at Tomy. A hearing was held on August 31, 1978 to determine the appropriate voting unit. On October 5, 1978, the regional director of Region 21 of the N.L.R.B. issued a decision and direction of election holding in part that all "seasonal employees" of Tomy were eligible to vote. Tomy filed a re-

quest for review of that aspect of the decision on October 16, 1978, which the Board denied on October 31, 1978.

Tomy is a corporation engaged in the manufacture, assembly, and distribution of toys. Toy sales are highly seasonal; eighty percent of Tomy toys are sold in December. As a result, Tomy's production cycle is seasonal, and the size of the workforce fluctuates throughout the year. The workforce is relatively small in January and February, slowly increases in size in March and April, begins to grow more rapidly in May, and reaches its peak size around August. From then on, the workforce begins to decrease, dropping off severely in October and November; and virtually all employees, except permanent employees, are off the payroll by sometime in December.

The workforce is divided into permanent employees, who work year-round, and seasonal employees, who work only for part of the year. Tomy also uses the services of "contract" employees, who work for an outside agency and were excluded from the bargaining unit. In August 1978, the peak employment period for the year, Tomy employed 42 permanent employees and 160 seasonal employees and retained the services of 83 to 100 contract employees.

Turnover among seasonal employees during each "season" averages 200 to 300 percent. From 1975 through late August 1978, Tomy hired 1047 seasonal employees. From the beginning of 1978 until August 24, 1980, Tomy hired 326 seasonal employees, only 160 of whom were still employed on August 24, 1978. The rest quit or were terminated, some working only a day, some a week or so, some the full period.

From 1973 through 1978, less than 25 percent of the seasonal employees hired in any year had worked for Tomy in any prior year. Of the 160 seasonal employees employed

on August 24, 1978, only 30 or 18.75 percent had ever worked for Tomy before 1978.

The permanent and seasonal employees are all hourly paid, work in the same areas, work the same hours, and enjoy similar benefits, but tend to perform different jobs.

The election was held on August 17, 1979. The results were:

| | |
|---|---|
| Approximate number of eligible voters | 270 |
| Void ballots | 0 |
| Votes cast for the Union | 125 |
| Votes cast against the Union | 113 |
| Valid votes counted | 238 |
| Challenged ballots | 14 |
| Valid votes counted plus challenged ballots | 252 |

Both the Union and Tomy filed timely objections to conduct affecting the results of the election, and a hearing was held to resolve the issues raised by the challenged ballots and the objections. The evidence surrounding the objection relating to the distribution of an altered sample ballot was conflicting, and the alleged altered ballot was not itself placed into evidence.

Eight current or former nonsupervisory Tomy employees testified they were shown or given a copy of an altered official N.L.R.B. sample ballot by Louie Giampapa, a Union business agent and organizer, or by some other male person or persons. Four were shown or given the ballot outside the plant at lunchtime a week or so before the election; the other four were handed copies of the ballot on their way to work in the morning during the week of the election. All eight witnesses testified that the copy of the altered sample ballot looked like the sample ballot portion of the official N.L.R.B. notice of election or like the ballot they received on election day and that it had been altered by an "X" having been placed in the "yes" box on the ballot.

Most also testified that they saw Giampapa show or give copies of the ballot to other employees.

Giampapa denied copying the official N.L.R.B. notice of election, but did admit he gave or showed copies of the official N.L.R.B. notice of election to some employees. Two pro-Union female employees denied distributing copies of an altered N.L.R.B. ballot.

On February 29, 1980, the hearing officer issued a report and recommendations, in which he ruled in part that the Union did not engage in objectionable conduct by displaying or distributing an altered official N.L.R.B. sample ballot, and recommended that the Union be certified as the exclusive bargaining representative.

Tomy filed timely exceptions with the regional director. By a second supplemental decision and certification of representative, dated April 11, 1980, the regional director summarily affirmed the hearing officer's report and certified the Union as the exclusive bargaining representative. Tomy filed a timely request for review, which the Board denied on August 13, 1980, Member Jenkins dissenting from the denial of review of Tomy's objection that the election should be set aside because the Union distributed an altered official ballot.

On September 4, 1980, the Union filed charge number 21-CA-19504, alleging that Tomy was unlawfully refusing to bargain. On March 17, 1981, the Board issued a decision and order, finding that the Union was properly certified in a unit appropriate for collective bargaining and that Tomy was violating the Act by refusing to bargain. Member Jenkins dissented, stating that he "did not agree to the underlying certification in this case and because the issue concerning a possible altered Board document remains . . . unresolved."

Thereafter, Tomy filed a petition to review and set aside the Board's decision and order pursuant to section 10(f) of the N.L.R.A., 29 U.S.C. § 160(f), and the Board subsequently cross-petitioned for enforcement pursuant to section 10(e) of the N.L.R.A., 29 U.S.C. § 160(e).

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

### THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LABOR LAW, WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE SETTLED BY THIS COURT.

#### Appropriate Unit Issue.

Section 9(a) of the N.L.R.A., 29 U.S.C. § 159(a), provides in part that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining" (emphasis supplied). The Act further provides that "[t]he National Labor Relations Board shall decide in each case, whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by [the N.L.R.A.], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." N.L.R.A. § 9(b), 29 U.S.C. § 159(b).

Interpreting these provisions, the Supreme Court has stated that "the selection of an appropriate bargaining unit lies largely within the discretion of the Board." *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805 (1976) (per curiam). *Accord, Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 491 (1947). Nonetheless, "the Board's powers in respect of unit determinations are not without limits, and if its decision oversteps the law . . . it must be reversed." *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171-72 (1971) (citations and quotation marks omitted). The petitioner submits that the instant decision "oversteps the law" and should be reversed.

In enforcing the Board's decision and order herein, the Court of Appeals stated in part:

> "While we do not find the inclusion of the seasonal employees in the bargaining unit to be clearly arbitrary, we do express concern over whether all of the seasonal employees had the requisite community of interest with the permanent employees to be so included
>
> ". . . .
>
> "In this case, seasonal employees with only a day of service with Tomy were eligible to vote. Whether seasonal employees who have minimal time of employment with a company can be said to have a substantial mutual interest with permanent employees in working conditions is questionable." Memorandum at 2.

The Court's reluctant acceptance of the inclusion of all seasonal employees in the unit with permanent employees points to the basic flaw in the Board's decision: by simply including all seasonal employees in the unit, the Board failed to exercise its discretion to determine the appropriate unit.

In determining whether to include seasonal employees in a unit with permanent employees, the Board has considered not only the similarity in wages, hours, and conditions of employment, but also whether the seasonal employees have a sufficiently strong interest in their employment to warrant their inclusion. *See, e.g., Knouse Food Cooperative, Inc.*, 131 N.L.R.B. 801, 803 (1961); *Lilliston Implement Co.*, 121 N.L.R.B. 868, 869 (1958). Whether seasonal employees will be found to have such an interest depends both on whether substantial numbers of seasonal employees have demonstrated a continuing reliance on that employment by returning in succeeding years and on whether seasonal employees enjoy a reasonable expectation of reemployment. *See, e.g., Seneca Foods Corp.*, 248 N.L R.B. 1119 (1980);

*E. W. Wiggins Airways, Inc.*, 210 N.L.R.B. 996, 997 (1974); *Baumer Foods, Inc.*, 190 N.L.R.B. 690 (1971); *P. G. Gray*, 128 N.L.R.B. 1026, 1028 (1960). In resolving these issues, the Board has looked at several criteria: (1) whether the employer draws its seasonal employees from the same area each year; (2) whether the employer gives preference to individuals who previously worked for it; (3) whether the employer attempts to recall individuals who have previously worked for it; (4) the rate of return of seasonal employees from one season to the next; and (5) the turnover rate among seasonal employees during a season. *See, e.g., Maine Apple Growers, Inc.*, 254 N.L.R.B. No. 60, 106 L.R.R.M. 1159, 1161 (1981).

Ostensibly, the Board applied these criteria here, but it failed even to attempt to distinguish between those seasonal employees who might have "a legitimate interest in the terms and conditions of employment in the bargaining unit" and those who do not. *Cf. N.L.R.B. v. Hondo Drilling Co.*, 428 F.2d 943, 946 (5th Cir. 1970) (upholding Board decision requiring 10 days of employment in 90 day period before the election for seasonal employees to vote). Instead, it simply treated all seasonal employees as a group possessing the same interests in the terms and conditions of employment. It thus failed to exercise its discretion to determine whether all seasonal employees shared a community of interest with permanent employees. As a result, employees who had worked only a day or two before the election and who would obviously not work more than another day or two after the election were allowed to vote along with seasonal and permanent employees who had been with Tomy for an extended period. The vote of the longer-term employees was thereby diluted in impact by the vote of a potentially significant number of very short-term seasonal employees having essentially no common interest in

the terms and conditions of employment. This is a result, petitioner submits, that "oversteps the law" and should be reversed.

**Altered Ballot Issue.**

Tomy alleged that the Union displayed and distributed an altered N.L.R.B. ballot or an altered portion of the official N.L.R.B. notice of election. The Board has long held that it constitutes objectionable interference with employee free choice in a representation election for any party to use an official Board document, or something resembling an official Board document, for campaign purposes to suggest that the Board endorses a particular party. *E.g., Gleason Plant Security, Inc.*, 252 N.L.R.B. No. 125, 105 L.R.R.M. 1313 (1980). The rule was first stated in *Allied Electric Products, Inc.*, 109 N.L.R.B. 1270, 1272 (1954):

> "[T]he Board . . . will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed will set aside the results of any election in which the successful party has violated this rule."

The rationale for the rule is self-evident: preservation of the Board's neutrality in frequently heated election campaigns. "[N]o participant in a Board election should be permitted to suggest either directly or indirectly to the voters that [the Board] endorses a particular choice." *Id.* at 1272.

In *Allied*, the union distributed a document purporting to be an official secret ballot. It had been altered by the word "yes" having been typed next to the "yes" box, an "X" having been placed in that box, and the following line having been typed on the bottom of the ballot: "Do not mark it any other way — Mark 'Yes' box only." *Id.* at 1271.

Because the document suggested Board support of the union, the election was set aside. *Id.* at 1272.

The campaign document need not be an exact replica of a Board document. In *Silco, Inc.*, 231 N.L.R.B. 110, 110-11 (1977), the posting of a handwritten version of the official ballot, containing misspellings and interlineations and omitting the official ballot instructions, was held to justify the setting aside an election. Similarly, in *Armstrong Cork Co.*, 250 N.L.R.B. No. 147, 104 L.R.R.M. 1520 (1980), the employer's distribution of an altered sample ballot resulted in a new election. A replica of a small portion of the official ballot, the sample ballot contained no reference to the United States or the Board, no representation that it was an official ballot, and no instructions at the bottom. *Id.* It also stated that the ballot was only a sample and that the official ballot would be handed out on election day. *Id. Accord, EDM of Texas,* 245 N.L.R.B. No. 119, 102 L.R.R.M. 1405 (1979); *Building Lease Corp.*, 239 N.L.R.B. 13 (1978); *Mercury Industries, Inc.*, 238 N.L.R.B. 896 (1978).

The rule has been extended to prohibit the use for partisan purposes of Board documents besides the official ballot. *E.g., GAF Corp.*, 234 N.L.R.B. 1209 (1978) (leaflet with N.L.R.B. name in same typeface as election notice poster); *Rebmar, Inc.*, 173 N.L.R.B. 1434 (1968) (altered notice of election).

The courts have upheld the Board's use of the *Allied* rule and required that it be consistently applied. *See, e.g., Monmouth Medical Center v. N.L.R.B.*, 604 F.2d 820, 824-30 (3rd Cir. 1979); *Regency Electronics, Inc.*, 499 F.2d 1129, 1132-33 (7th Cir. 1973).

There is thus a relatively large and well-established body of precedent the Board and courts can draw upon in resolving the issues raised in such cases. The instant case,

however, contains a complicating fact not found in any other reported decision: the objecting party here was unable to produce a copy or copies of the altered Board document. Consequently, it became even more critical than usual that the proper legal standard be applied for determining whether the altered document was objectionable and that the credibility issues raised by conflicting testimony be fairly and fully resolved. The hearing officer had expressly to determine whether an altered document had been distributed, what that document looked like, and whether the document was objectionable. Without these determinations set forth fully in the record, any Board order requiring the employer to bargain necessarily rested on an essentially unascertainable factual basis, as the altered document was not itself part of the record.

The hearing officer here started from the erroneous legal premise that the objecting party had to determine that "a reproduction of the Board's official ballot" was distributed, not merely "a partisan document having some resemblance to a ballot." As noted above, the Board has consistently imposed a much stricter standard, requiring that an election be set aside if the altered document is an exact reproduction of a Board document, bears a potentially confusing resemblance to the Board document, or even uses a typeface like that found in a Board document. Perhaps as a result of applying an erroneous legal standard, the hearing officer did not find it necessary to resolve the credibility disputes raised by the conflicting testimony of the witnesses. The hearing officer never expressly ruled whether he credited or discredited Tomy's witnesses or credited or discredited the Union's witnesses. Somewhat contradictorily, he found only that the "testimony [of Tomy's witnesses] indicates that a document resembling a ballot used by the Board may have been distributed to employees by the [Union]," but

that Tomy had failed to prove that the Union "distributed an altered reproduction of a Board ballot to employees."

But this finding is insufficient to support the Board's order to bargain. Given the testimony of Tomy's witnesses, which the hearing officer never expressly discredited and frequently implicitly credited, the hearing officer had to determine whether something bearing a confusing resemblance to a Board ballot had been displayed and distributed by the Union. This was precisely the conclusion reached by dissenting member Jenkins, when he stated that he was unable to join in the issuance of an order to bargain "because the issue concerning a possibly altered Board document remains . . . unresolved." Because the issue remains unresolved, and because of the importance of insuring that the election process not be tainted by improper use of a Board document, Tomy submits that the Board's order is not supported by substantial evidence.

**Conclusion.**

For the foregoing reasons the petitioner submits that the decision of the Court of Appeals raises important issues of federal labor law which should be decided by this Court and that the petition for a writ of certiorari should be granted.

Dated: March 8, 1982.

Respectfully submitted,

JOSEPH E. HERMAN,

*Counsel for Petitioner.*

*Of Counsel:*

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON.

# Appendix

## APPENDIX A.

## Memorandum Decision of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Tomy Corporation, a Wholly Owned Subsidiary of Tomy Kogyo, Inc., Petitioner/Cross Respondent, v. National Labor Relations Board, Respondent/Cross Petitioner. Nos. 81-7203 and 81-7302.

Filed: December 9, 1981.

Petitioner for Review and Cross-Petition for Enforcement of a Decision and Order of the National Labor Relations Board.

Before: CHOY and ANDERSON, Circuit Judges and KEEP*, District Judge.

Tomy Corporation (Tomy) has petitioned for review of a decision of the National Labor Relations Board. The Board cross-appeals for enforcement of the order. The Board's decision is reported at 255 N.L.R.B. No. 1.

Tomy argues that seasonal employees should not have been included in the bargaining unit, that the Board improperly sustained the union's challenges to several employees' eligibility to vote, and that the union made misrepresentations regarding the election.

The Board's findings of fact are conclusive if supported by substantial evidence, and the Board's legal conclusions concerning the appropriateness of the bargaining unit will be credited on appeal unless clearly arbitrary. *N.L.R.B. v. Big Three Industries, Inc.*, 602 F.2d 898, 901 (9th Cir. 1979); *Pacific Southwest Airlines v. N.L.R.B.*, 587 F.2d 1032, 1037 (9th Cir. 1978).

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*Honorable Judith N. Keep, United States District Judge, Southern District of California, sitting by designation.

Applying these standards, we enforce the order of the Board. The Board's factual findings regarding the challenged employees' eligibility to vote and the union's conduct regarding the election are supported by substantial evidence. While we do not find the inclusion of the seasonal employees in the bargaining unit to be clearly arbitrary, we do express concern over whether all of the seasonal employees had the requisite community of interest with the permanent employees to be so included.

The issue of bargaining unit determination is within the particular expertise of the Board; hence we will not overturn a decision of the Board unless there has been an abuse of discretion. *N.L.R.B. v. J.C. Penney, Store No. 29-9* 620 F.2d 718, 719 (9th Cir. 1980). The critical determinant in defining the bargaining units is whether the employees share a substantial community of interests sufficient to justify their mutual inclusion in a single bargaining unit. *Id. See also, Pacific Southwest Airlines, supra*, 587 F.2d at 1038.

In this case, seasonal employees with only a day of service with Tomy were eligible to vote. Whether seasonal employees who have minimal time of employment with a company can be said to have substantial mutual interest with permanent employees in working conditions is questionable. However, our review of a Board determination that a particular bargaining unit is appropriate is narrowly circumscribed. *Spring City Knitting Co. v. N.L.R.B.*, 647 F.2d 1011, 1013 (9th Cir. 1981). At this time we do not find an abuse of discretion by the Board; its other factual findings are supported by substantial evidence. The petition for review is DENIED. The Board's cross-application for enforcement is GRANTED.

## APPENDIX B.

### Decision and Order of the National Labor Relations Board.

United States of America Before the National Labor Relations Board.

Tomy Corporation, a Wholly-Owned Subsidiary of Tomy Kogyo, Inc., and General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21-CA-19504. 255 NLRB No. 1. FJZ — D-7492, Carson, CA.

Upon a charge filed on September 4, 1980, by General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. herein called the Union, and duly served on Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued a complaint on September 25, 1980, and an amendment to the complaint on October 17, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 11, 1980, following a

Board election in Case 21-RC-15635,[1] the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about September 4, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 7, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. On October 27, 1980, Respondent filed its answer to the amendment to the complaint.

On December 1, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 9, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause and its answer to the complaint, Respondent admits that it has refused to bargain with the Union, but asserts that the Regional Director's certification in Case 21-RC-15635 was erroneous

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[1]Official notice is taken of the record in the representation proceeding, Case 21-RC-15635, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

and invalid. Respondent requests that the Board reexamine the Regional Director's decision to affirm the Hearing Officer's findings that Respondent failed to satisfy its burden of proof with respect to its election objections. Respondent also requests the Board to review the Regional Director's sustaining of challenged ballots and his inclusion of seasonal employees in the unit. Counsel for the General Counsel argues that Respondent is not presenting newly discovered or previously unavailable evidence which was not considered by the Board, and is merely attempting to relitigate issues which were or could have been raised in the prior representation proceeding. We agree with the General Counsel.

Our review of the record herein, including the record in Case 21-RC-15635, indicates that the Regional Director's Decision and Direction of Election was issued on October 5, 1978. On October 13 and December 1, 1978, the Regional Director issued Errata to the Decision and Direction of Election. Respondent requested review of the Decision and Direction contending that the Regional Director erred in including seasonal employees in the unit. The Board denied the request for review on October 31, 1978. The election was held on August 17, 1979. The tally of ballots showed that of the valid votes counted, 125 were for, and 113 were against, the Union, and there were 14 challenged ballots. The challenged ballots were sufficient in number to affect the results of the election. On August 21, 1979, the Union filed objections to the election, and on August 23, 1979, Respondent filed objections. On September 18, 1979, the Regional Director issued a Supplemental Decision and Order Directing Hearing, ordering a hearing to resolve the 14 challenged by ballots and certain objections. On February 28, 1980, the Hearing Officer's report and recommendations recommended that some challenges to the

ballots be sustained and some challenges be overruled; that Respondent's objections be overruled; that the Union's objections be found moot; and that the Union be certified as the collective-bargaining representative of Respondent's employees in the unit described below. Respondent filed exceptions to the Hearing Officer's report on March 19, 1980. On April 11, 1980, the Regional Director issued a Second Supplemental Decision and Certification of Representative affirming the Hearing Officer's report. On May 6, 1980, Respondent requested review of the Second Supplemental Decision and Certification of Representative. On August 13, 1980, the Board denied Respondent's request for review as it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the

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[2]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Member Zimmerman notes that Member Jenkins premises his dissent from the granting of summary judgment in this case upon his disagreement with the Board's determination in the underlying representation proceeding. Although Member Zimmerman did not participate in that underlying proceeding, he considers the Board bound to grant summary judgment without regard to the merits of the issue respondent now attempts to relitigate. See *Bravos Oldsmobile*, 254 NLRB No. 135 (1981).

decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## Findings of Fact

### I. The Business of Respondent

Respondent, a California corporation, is and has been engaged in the business of assembling toys and operates facilities located at 901 East 233rd Street and 800 East 230th Street, Carson, California. In the normal course and conduct of its business operations, Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, and employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. The Labor Organization Involved

General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(4) of the Act.

### III. The Unfair Labor Practices

#### A. *The Representation Proceeding*

##### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees of the Employer at its facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On August 17, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 21, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 11, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about August 20, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 4, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 4, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such

refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, had a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction*

*Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Employer at its facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees; guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 11, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 4, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging

in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Tomy Corporation, a wholly-owned subsidiary of Tomy Kogyo, Inc., Carson, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Truckdrivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees of the Employer at its facilities located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees, excluding all clerical employees,

professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at the Carson, California, facilities copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[3]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 17, 1981.

John H. Fanning, Chairman

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting:

On August 13, 1980, the Board denied the Employer's Request for Review of the Regional Director's Second Supplemental Decision and Certification of Representative. I dissented in part for I would have granted review with respect to the Employer's objection which alleged that the Petitioner displayed and distributed a version of the Board's notice of election altered to show an "x" in the "yes" box of the sample ballot. Since I did not agree to the underlying certification in this case and because the issue concerning a possible altered Board document remains for me unresolved, I hereby dissent from this grant of Summary Judgment.

Dated, Washington, D.C. March 17, 1981

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Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX C.

**Regional Director's Decision and Direction of Election.**

United States of America Before the National Labor Relations Board.

Tomy Corporation, a Wholly-Owned Subsidiary of Tomy Kogyo, Inc.,[1] Employer, and General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. Case No. 21-RC-15635.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

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[1]The name of the Employer appears as amended at the hearing.

[2]By telegraphic motion dated September 18, 1978, Tomy Employees Association, herein called the Intervenor, moved that Petitioner's brief to the undersigned in this matter be "stricken from consideration," inasmuch as a copy thereof had not been served on the Intervenor as required by Section 102.67 of the Board's Rules and Regulations, Series 8, as amended. I note, in this regard, that Petitioner's brief has attached a proof of service indicating service thereof upon the Intervenor's representative and, further, that the proof of service attached to the Employer's brief, likewise, indicates service thereof not upon the Intervenor, but upon the Intervenor's representative at the address of the Employer's facility, despite the fact that the Intervenor's representative's address is different from the Employer's address according to the appearances made on the record herein. Moreover, I note that the Intervenor's motion, itself, does not attach proof of service upon Petitioner, or the Employer, as required by Sections 102.65, 102.112, and 102.113(b) of the Board's Rules and Regulations, Series 8, as amended. In view of the foregoing, it appears that service of documents in this matter, in strict accordance with the Board's Rules, has not been made

(footnote continued on following page)

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization(s) involved claim to represent certain employees of the Employer.[3]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

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by the Petitioner, Intervenor, or Employer. However, inasmuch as all parties, through their respective representatives, have received the briefs of the Petitioner and the Employer, I find that, despite the absence of strict compliance with the Board's Rules, no prejudice has occurred, and, accordingly, the Intervenor's motion is hereby denied.

[3]Petitioner refused to stipulate that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act. The evidence adduced at the hearing reveals that the Intervenor was formed shortly before the hearing and consists of a steering committee at present. It anticipates employee participation to elect officers, establish bylaws, and ultimately to negotiate on behalf of employees with the Employer with regard to wages, hours, and other conditions of employment. On the basis of the foregoing facts, I find that the Intervenor is a labor organization within the meaning of the Act. In so concluding, I note that its avowed purposes are consistent with those delineated in Section 2(5) of the Act, and it anticipates employee participation in the realization of those purposes. That the Intervenor is inchoate in form at present is not determinative of its status as a labor organization. *Roytype, Division of Litton Business Systems, Inc.*, 199 NLRB 354. Nor is the fact that it has not had occasion to engage in collective-bargaining negotiations with employers. *Hotel Properties, Inc., d/b/a The Landmark Hotel and Casino*, 194 NLRB 815. I find significant its solicitation of employee interest together with the intervention in the instant ongoing representation proceeding, which, when coupled with its avowed purposes as set forth above, leads to my conclusion that it constitutes a labor organization within the meaning of the Act. *Urban Research Corporation*, 195 NLRB 147.

[4]The unit description is in substantial accord with the agreement of the parties, except with respect to cafeteria employees, discussed *infra*.

The Employer is a California corporation which is a subsidiary of Tomy Kogyo, Inc., located in Tokyo, Japan, and is engaged in the assembly of toys from parts shipped to the Employer from Japan and

All production and maintenance employees of the Employer at its facility located at 901 East 233rd Street,

other sources. The record evidence reveals that the Employer's operation is structured to complete production by December of each year in order to market its product at Christmas time. The production commences in February or March of each year, reaches a peak in about August or September of that year, and subsides gradually until November or December, after which time little or no production is performed. The Employer's complement of employees corresponds to this production cycle, with hiring of additional employees commencing in February or March, reaching a peak in August or September, then gradually being reduced until November or December, at which time only permanent year-round employees are retained.

In conjunction with this cyclical employment pattern, the Employer employs three types of employees in the unit herein found appropriate. Thus, there are approximately 42 permanent, year-round employees, approximately 160 seasonal employees at the peak of the season in late August and early September, and from 80 to 100 employees whose services are obtained through an independent employment agency. The parties are in agreement that the permanent employees are eligible to vote in the agreed-upon appropriate unit, and the parties are also in agreement that the employees whose services are obtained via the employment agency, so-called "contract" employees, are not eligible to vote in the election. In view of the evidence that the agency providing these "contract" employees controls their substantive conditions of employment, I find, in agreement with the parties, that the "contract" employees are not eligible to vote in the election. With regard to the seasonal employees, Petitioner asserts that these employees are eligible to vote, while the Employer asserts that either (1) they are ineligible to vote, or (2) only those who had previously been employed by the Employer should be eligible to vote. The Intervenor took no position on this issue.

The record discloses that the seasonal employees perform the same type of work as permanent employees. All employees have the same starting wage, hours of employment, supervision, breaks, use of lunchroom and other facilities, medical, dental, and life insurance coverage, timeclock responsibilities, and sick pay. The permanent employees may participate in a profit-sharing plan, which seasonal employees are not offered, and, although all employees are given sick leave, the permanent employees are granted slightly more. All employees are subject to a similar wage-review policy. The employees frequently interchange duties, and there are instances in which seasonal employees have been hired as permanent employees. All employees are drawn from the metropolitan Los Angeles area, including Orange County to the south, and learn of availability of work by advertisements placed in newspapers, word of mouth, and as a result of direct communication between the Employer and former seasonal employees. In this latter case, the evidence indicates that the Employer maintains contact with former seasonal employees, and in or about February or March of a given year, contacts them by telephone, if possible, to offer them reemployment. The record shows that each year, approximately 18 to 25 percent of the previous year's seasonal employees return the following year. There

(footnote continued on following page)

Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality

is some evidence of an employer policy of preferring employees with prior experience with the Employer over individuals without such experience.

The Board has held that, where seasonal employees share substantially the same terms and conditions of employment as permanent employees and have a reasonable expectancy of substantial seasonal employment from year to year, they are eligible to vote in an election. *Knapp-Sherrill Company*, 196 NLRB 1072; *Baumer Foods, Inc.*, 190 NLRB 690. Such factors as the labor market from which employees are drawn, prior employment experience as a factor in obtaining employment, common conditions of employment, including supervision, a recall policy by an employer, and reemployment of former employees, are considered by the Board in making such a determination. *Millbrook, Inc.*, 204 NLRB 1148. Where such seasonal employees have markedly different terms of employment and no record is kept of their employment which would suggest recall, they have been found ineligible to vote. *Aquacultural Research Corp.*, 215 NLRB 1. However, where, as here, seasonal and permanent employees share substantially identical terms and conditions of employment, frequently interchange jobs, have common supervision and wage scales and benefits, and are subject to recall if available for work, they have been found eligible to vote. *Baumer Foods, Inc., supra; Millbrook, Inc., supra.* In view of the foregoing factors present in the instant case, I find that the seasonal employees share a sufficient community of interest with permanent employees and have a reasonable expectation of substantial seasonal employment, thus are eligible to vote in the election together with the permanent employees.

With regard to the Employer's assertion that only those seasonal employees who had previously worked for the Employer are eligible to vote, the Board has rejected the application of such formulae in seasonal industries. *Case-Swayne Co., Inc.*; 209 NLRB 1069. Moreover, the application of such a formula in the instant case would constitute sole reliance upon previous employment with the Employer as the criteria for eligibility, as in the construction industry, see, e.g.: *Daniel Construction Company, Inc.*, 133 NLRB 264 and 167 NLRB 1078; however, as noted above, the question is whether the seasonal employees have an expectancy of employment *in futuro*, the answer to which may rely, in part, upon previous employment with the Employer, but which also includes other factors as set forth above. I note, in this regard, that although approximately 18 percent of the current (at the time of the hearing) seasonal work force of the Employer had previously worked for the Employer in some prior year, there is no evidence of what percentage of these employees with previous experience were contacted by the Employer to ascertain whether they wished to be reemployed. Thus, that 18 percent chose to return is not to say that others, at the time of their layoff, did not have an expectancy of returning which was thereafter dispelled by intervening events such as employment elsewhere or other reasons.

The Employer would include, and Petitioner would exclude, two cafeteria employees. The record evidence reveals that these employees work in an employee cafeteria adjacent to the production area at the

control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

## DIRECTION OF ELECTION[5]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also

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Employer, wherein they perform services related to the providing of pre-packaged food for employees. These employees wear distinctive uniforms, and are hourly paid as are the production employees. The cafeteria employees also perform clerical duties in conjunction with their cafeteria duties, including ordering commodities to stock the cafeteria. These employees have the same benefits as other employees, and are under the supervision of Mr. Silva, who also supervises production employees. Based upon these circumstances, together with the daily contact these employees have with unit employees, and the Board's general rule of inclusion of such employees in production and maintenance units, I find that the cafeteria employees share a sufficient community of interest with unit employees, and shall include them in the unit herein found appropriate. *Scholastic Magazines, Incorporated*, 192 NLRB 461, footnote 4; *Mead-Atlanta Paper Company*, 123 NLRB 306.

There are approximately 200 employees in the unit.

[5]In accordance with usual Board procedure in seasonal operations such as this, I shall direct that the election be held at or about the appropriate seasonal peak, on a date to be determined by the undersigned, among the employees in the appropriate unit who are employed during the payroll period immediately preceding the date of the issuance of the notice of election by the undersigned. *Six Flags Over Georgia, Inc.*, 215 NLRB 809; *Bogus Basin Recreation Association*, 212 NLRB 833; *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82; *Toledo Marine Terminals, Inc.*, 123 NLRB 583.

eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election dates and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by General Truck Drivers, Chauffeurs & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; by Tomy Employees Association; or by neither labor organization.

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list

must be received in Region 21, 606 South Olive Street, 24th Floor, Los Angeles, California 90014 on or before October 12, 1978. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by October 18, 1978.

Dated October 5, 1978 at Los Angeles, California.

/s/ Wilford W. Johansen
Regional Director, Region 21

## APPENDIX D.

### Regional Director's Second Supplemental Decision and Certification of Representatives.

United States of America Before the National Labor Relations Board, Region 21.

Tomy Corporation, a Wholly-Owned Subsidiary of Tomy Kogyo, Inc., Employer, and General Truck Drivers, Chauffeurs, & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner. Case 21-RC-15635.

SECOND SUPPLEMENTAL DECISION
AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued by the Regional Director of Region 21 on October 5, 1978, an election by secret ballot was conducted on August 17, 1979, under the direction and supervision of the Regional Director of Region 21, among the employees of the Employer, in the unit found to be appropriate for the purpose of collective bargaining. The tally of ballots which served upon the parties immediately following the election showed the following results:

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|---|---|
| Approximate number of eligible voters | 270 |
| Void ballots | 0 |
| Votes cast for Petitioner | 125 |
| Votes cast against participating labor organization | 113 |
| Valid votes counted | 238 |
| Challenged ballots | 14 |
| Valid votes counted plus challenged ballots | 252 |

The challenged ballots were sufficient in number to affect the results of the election. On August 21, 1979, the Petitioner timely filed objections to the election, a copy of which

was timely served upon the Employer. On August 23, 1979, the Employer timely filed objections to the election, a copy of which was timely served upon the Petitioner. Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned after reasonable notice to all parties to present relevant evidence, completed an investigation of the objections, duly considered all evidence submitted by the parties, and, on September 18, 1979, issued his Supplemental Decision and Order Directing Hearing.

A hearing was directed for the purpose of receiving evidence to resolve the issues raised by Petitioner's Objections Nos. 1 and 2, Employer's objections, and by the challenges to the ballots[1] of Carolyn Tabb, Isabel Diess, Michael McCrea, Brian Glenn, Kay Baker, Michael Sesto, Rick Harris, Susan Dodson, Elizabeth Penalosa, Sheri Kitchens, Ann Medina, Maria Godoy, Tamara Booher, and Yolanda Gonzales. The Regional Director further ordered that the Hearing Officer prepare and cause to be served upon the parties a report containing the resolution of the credibility of witnesses, findings of fact, and recommendations to the undersigned as to the disposition of the Petitioner's Objections Nos. 1 and 2, the Employer's objections, and the 14 challenged ballots.

Copies of the Supplemental Decision and Order Directing Hearing were served on all parties, and pursuant thereto, a hearing was held on October 29, 30 and 31, and November 1, 2, 9, 14, 19, 20, and 21, 1979, at Los Angeles, California, before the duly designated Hearing Officer.

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[1]The names of McCrea, Sheri Kitchens, Godoy, and Gonzales were misspelled in the Supplemental Decision and Order Directiing Hearing and are correctly spelled herein.

On February 28, 1980, Hearing Officer Gordon A. Letter issued and duly served on the parties his Hearing Officer's Report and Recommendations in which he recommended that the challenges to the ballots of Carolyn Tabb, Isabel Diess, Brian Glenn, Kay Baker, Michael McCrea, and Susan Dodson be sustained; that the challenges to the ballots of Rick Harris, Elizabeth Penalosa, Ann Medina, Maria Godoy, Tamara Booher, Yolanda Gonzales, Michael Sesto, and Sheri Kitchens be overruled; that Employer's Objections be overruled; that Petitioner's Objections Nos. 1 and 2 be found moot in view of the challenged ballot resolutions above, which eliminate the possibility that the challenged ballots would be determinative of the outcome of the election; and that a Certification of Representative be issued to the Petitioner.[2] On March 19, 1980, the Employer timely filed exceptions and brief in support of exceptions to the report and recommendations of the Hearing Officer.

The undersigned has reviewed the rulings made by the Hearing Officer at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The undersigned has considered the entire record in this case, including the Hearing Officer's Report, the parties' briefs to the Hearing Officer, the Employer's exceptions and brief in support of exceptions to the report and recommendations of the Hearing Officer, and hereby adopts the Hearing Officer's findings of fact and recommended conclusions of law.

## Conclusion

The undersigned having adopted the Hearing Officer's findings of fact and recommended conclusions of law, hereby sustains the challenges to the ballots cast by Caroly Tabb,

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[2]At the hearing the Employer withdrew its Objection No. 1.

Isabell Diess, Brian Glenn, Kay Baker, Michael McCrea, and Susan Dodson; hereby overrules the challenges to the ballots cast by Rick Harris, Elizabeth Penalosa, Ann Medina, Maria Godoy, Tamara Booher, Yolanda Gonzales, Michael Sesto, and Sheri Kitchens; hereby overrules the Employer's Objections; and finds that Petitioner's Objections Nos. 1 and 2 are moot in view of the disposition of challenged ballots since the remaining unresolved challenged ballots are insufficient in number to affect the results of the election. As the results of the election show that a majority of the valid ballots have been cast for the Petitioner, pursuant to the authority vested in the undersigned by the National Labor Relations Board.

IT IS HEREBY CERTIFIED that General Truck Drivers, Chauffeurs, & Helpers, Local 692, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, has been designated and selected by a majority of the employees, in the unit herein involved,[3] as representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.[4]

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[3]All production and maintenance employees of the Employer at its facility located at 901 East 233rd Street, Carson, California, and 800 East 230th Street, Carson, California, including assemblers, material handlers, linemen, truckdrivers, forklift operators, quality control employees, shipping clerks, and cafeteria employees; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

[4]Under the provisions of Sections 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Second Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by April 24, 1980.

DATED at Los Angeles, California, this 11th day of April, 1980.

/s/ Wilford W. Johansen
Wilford W. Johansen
Regional Director
National Labor Relations Board
Region 21

## APPENDIX E.

## Order of the Court of Appeals for the Ninth Circuit Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Tomy Corporation, a Wholly-Owned Subsidiary of Tomy Kogyo, Inc., Petitioner-Cross Respondent, vs. National Labor Relations Board, Respondent-Cross Petitioner. Nos. 81-7203 and 81-7302.

Filed: January 29, 1982.

Before: CHOY and ANDERSON, Circuit Judges, and KEEP*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

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*The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

## APPENDIX F.

### Statutory Provisions Involved.

Relevant portions of Sections 9(a) and 9(b) of the National Labor Relations Act, 29 U.S.C. §§ 159(a), (b).

> Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .
>
> Section 9(b). The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .